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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

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No. 195

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., CHESTNUT FARMS-CHEVY CHASE DAIRY COMPANY, ET AL.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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vs.

THE UNITED STATES OF AMERICA,

Respondent

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Petitioners, Maryland and Virginia Milk Producers Association, Incorporated; B. B. Derrick; Chestnut Farms-Chevy Chase Dairy Company; Thompson's Dairy, Inc.; Richfield Dairy Corporation; Simpson Bros., Inc.; Safeway Stores, Incorporated; Alexandria Dairy Products Company, Incorporated; and Harvey Dairy, Inc. ask the issuance of a Writ of Certiorari to review the judgment below reversing a decision of the District Court of the United States for the District of Columbia which dismissed the indictment herein.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 1254(1), U. S. Code Judiciary and Judicial Procedure. The decision below was rendered June 17, 1949 (R. 25). The time within which the petition must be filed is governed by Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

Statutes Involved

The Capper-Volstead Act of February 18, 1922, 42 Stat. 388, 7 U. S. C. 291, 292, is as follows:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein or,
>
> Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

> Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

* * * * * * *

If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

> The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

Section 6 of the Clayton Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. 17, is as follows:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

Indictment and Opinion Below

The indictment is printed in full in the record at p. 6. The opinion of the District Court is printed on p. 21 of the record. The opinion below is not yet reported but will be found at p. 25 of the record.

Questions Presented

1. Whether the indictment herein charging a dairymen's co-operative and its contracting distributors with a conspiracy to "eliminate and suppress competition" (Ind. par. 35, R. 12) in the sale and resale of milk is sustainable as a price fixing conspiracy in view, (a) of the immunizing provisions of the Capper-Volstead Act (7 U. S. C. Sec. 291) and Sec. 6 of the Clayton Act (15 U. S. C. Sec. 17); (b) of the absence of "outside" groups, present in *U. S.* v. *Borden,* 308 U. S. 188, see also *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 798; and (c) of the absence of any charge that the co-operative and its contracting distributors conspired *unduly to enhance* the price of milk within the meaning of Sec. 2 of the Capper-Volstead Act.

2. Whether the Capper-Volstead Act, 7 U. S. C. Sec. 291, in providing that agricultural associations in marketing their products "may make the necessary contracts and agreements to effect such purposes" authorizes merely contracts to *purchase* milk from its members. Does it not authorize and immunize contracts with distributors as well, thus making intake and outlet provisions symmetrical?

3. Whether the gist of the indictment being an alleged scheme to "eliminate and suppress competition" (a) by means of full supply contracts, (b) the refusal of the co-operative to sell non-contracting distributors at the same price as defendant distributors, (c) the classification of milk into Classes I, II and III and (d) the alleged agreement of the distributors not to resell fluid milk to the public at prices below the price of Class I milk, this plan of distribution is not, under the Capper-Volstead and Clayton Acts, entirely legal and hence the other acts charged would amount merely to means to make it effective and so could not constitute direct restraints on interstate commerce.

4. Whether as held by the Court below (R. 28), restrictive contracts made under the Capper-Volstead Act by an agricultural co-operative with its contracting distributors, no "outside" groups being involved, are illegal unless approved by the Secretary of Agriculture under the Agricultural Marketing Agreement Act, 7 U. S. C. Sec. 601, *et seq.*

Statement

The District Court (Judge Keech), on motion, dismissed the indictment herein as not stating sufficient facts (R. 21). The Court of Appeals, by a divided court, Judges Edgerton and Morris being the majority, reversed. Judge Miller dissented without opinion (R. 26, 28).

The indictment is summarized by the Court below as follows:

> "The paragraphs of the indictment indicated by the figures in parentheses make substantially the following statements. The appellees are an incorporated Association, the members of which are about 1,500 Maryland and Virginia milk producers who supply 80 percent of the milk sold to distributors in the Washington metropolitan area (20); the Secretary-Treasurer of this Association (9); and seven corporations that distribute milk and its products to consumers and other purchasers in the District of Columbia. These distributors buy and resell 86 percent of all milk supplied to the Washington metropolitan area (21). Appellees have conspired to eliminate and suppress competition in the sale of milk to these distributors, in its purchase by them, and in its resale by them to consumers and other purchasers (35). For those purposes (36, 37) appellees have done these things. Appellee distributors have contracted with appellee Association that they will buy no milk from producers or others who are not members of the Association, but will buy only from the Association, as far as it is able to supply their needs, which it agrees to do as far as it can (36 (a) (b)).

> Appellees have agreed to fix the prices at which the distributors will buy milk (36 (g)) and also the prices at which they will resell it (36 (m)). They have agreed on a classification of milk for price purposes according to use (36 (f) (g)). They have agreed that appellee distributors will remove from the market 'excess' milk, i.e. any milk the Association has for sale in excess of the amount these distributors can resell at the prices agreed upon (36 (n) (o)). They have agreed that the Association will prevent and eliminate competition from distributors not parties to the conspiracy by inducing them not to cut prices, attempting to deprive price-cutters of adequate supplies of milk, interfering with the transportation of milk to them, furnishing milk to appellee distributors at reduced rates for use in taking away contract business from price-cutters, and driving them out of business (36 (p)). They have agreed that the Association will not supply milk, to any distributor not agreeing to buy his full supply from the Association, at prices as low as those charged to appellee distributors (36 (d)). The conspiracy has been successful: 'the defendants by agreement and concerted action have done the things which, as hereinbefore alleged, they conspired to do.' (37)" (R. 26-27.)

The Court below treated the indictment as charging a straight price-fixing conspiracy, in the classic tradition of *U. S.* v. *Socony-Vacuum Co.*, 310 U. S. 150, 218-222. It conceded that the Capper-Volstead Act and the Clayton Act "give some privileges to combinations of agricultural producers," which privileges it did not specify, but disposed of the case on the ground that "a combination of producers and distributors to eliminate competition and fix prices at successive stages in the marketing of an agricultural product is not privileged," citing *U. S.* v. *Borden*, 308 U. S. 188, and *Allen Bradley* v. *Local Union No. 3*, 325 U. S. 798. (R. 27.)

The opinion is disappointing in that it gives no consideration to the vital distinction between the *Borden* and *Allen Bradley* cases and the present, namely the absence in the present case of "outside" groups, whose presence destroyed the immunizing effect of the Capper-Volstead and Clayton Acts in the *Borden* case and the Norris-La Guardia and Clayton Acts in the *Allen Bradley* case. It is as if the opinion below were written prior to *U. S.* v. *Hutcheson*, 312 U. S. 219.

The Court below gives no reasons for its curious holding that fixing prices of milk according to use can only be done under the Agricultural Marketing Agreement Act, unaware, apparently, that the Classified Plan for selling milk antedated that Act and was approved by this Court in *U. S.* v. *Rock Royal Co-operative*, 307 U. S. 533, 549-51, and *Nebbia* v. *N. Y.*, 291 U. S. 502, 518.[1]

Reasons for the Allowance of the Writ

1. This is the first case to reach this Court wherein acts done by an agricultural co-operative with its contracting distributors, in its own self-interest, are charged to be a conspiracy. There are no "outside" groups present, as in *U. S.* v. *Borden*, 308 U. S. 188, 205 and *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 798, 807. We contend that there is no essential difference between the immunities of labor unions, acting in their self-interest, under the Clayton

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[1] See also Gaumnitz & Reed, *Some Problems Involved in Establishing Milk Prices*, pp. 28-31; Metzger, *Co-op Marketing of Milk*, Techn. Bul. No. 179, pp. 17-21, U. S. Dept. of Agr.; Bartlett, *Co-op in Marketing Dairy Products*, pp. 11-12; Horner: *A Comparative Study of Various Fluid Milk Marketing Plans*, American Cooperation, 1926, Vol. II, p. 24.

The Government conceded the validity of classification of milk according to use by expressly inserting a provision to that effect in the consent decree in the *Borden* case. *U. S.* v. *Borden*, D. C. N. Dist. Ill. Eastern Div. No. 2088, Consent Decree, Sept. 16, 1940, par. VI (b).

and La Guardia Acts, and the immunities of an agricultural co-operative under the Clayton and Capper-Volstead Acts. This Court in its opinion in *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 798, 807, stated:

> "under our holdings in the *Hutcheson* case and other cases which followed it had there been no union-contractor-manufacturer combination the unions actions here, coming as they did within the exemptions of the Clayton and Norris-LaGuardia Acts, would not have been violations of the Sherman Act."
>
> "Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups."

The distributors with whom the co-operative herein made contracts are obviously not "outside" groups. They are the normal, the only, second parties to any contracts the co-operative, on the out-go, can make. The Capper-Volstead Act, 7 U. S. C. 291, provides that agricultural associations may have marketing agencies in common and that "such associations and their members may make the necessary contracts and agreements to effect such purposes." This covers not merely contracts with producers to obtain a full supply of milk but with the distributors to market it. The distributors are thus, on the out-go, the only entities with which the co-operative can, in the nature of things, have any contractual relations at all. Hence a co-operative's contracting distributors cannot be "outside" groups, within the meaning of the *Borden* and *Allen Bradley* cases. Further there is no question here, as in the *Allen Bradley* case, of "employer help" or "distributor help" in "controlling markets and prices"—the motive force of the alleged conspiracy comes from the co-operative and is part of the effort of the co-operative to make itself effective.

In ignoring the above principles the decision of the Court below is in conflict with this Court's decision in *U. S.* v. *Hutcheson,* 312 U. S. 219, 232:

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

The decision below is also in clear conflict with that of the District Court (Oregon) in *U. S.* v. *Dairy Co-operative Association,* 49 F. Supp. 475 wherein, for acts done by a co-operative with distributors alone, the Court refused "to scuttle the plain language of the Clayton Act as to co-operatives, as anti-labor courts scuttled the labor provisions of the same act, with the serious consequences that endure to this hour" (Op. cit. pp. 475-6).

2. The gist of the conspiracy to "eliminate and suppress competition" is the use by the co-operative (a) of full supply contracts; (b) the refusal to sell non-contracting distributors at the same price as defendant distributors; (c) the classification of milk into Classes I, II and III dependent on its use; and (d) the alleged agreement of distributors not to resell fluid milk to the public below the price of Class I milk (R. 12-14). All the other acts charged are merely efforts to put the above plan into effect. If then the plan itself is legal under the Capper-Volstead Act, the other acts would not constitute direct restraints but at most, would fall into the area of State torts. They would resemble the acts done in *U. S.* v. *Hutcheson,* 312 U. S. 219.

Our position is that under the economic conditions peculiar to the fluid milk industry[2] and under the Capper-Volstead and Clayton Acts, the co-operative's marketing

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[2] See *Nebbia* v. *N. Y.,* 291 U. S. 502; *U. S.* v. *Rock Royal Co-operative,* 307 U. S. 533; *Hood & Sons* v. *Dumont,* 336 U. S. 525.

plan was entirely legal. Full supply contracts are traditional in the industry and valid.[3] The co-operative has a natural right to choose its own distributors and can give a price incentive to distributors to make contracts with it.[4] The Classified Plan of basing prices on Class I, II and III milk according to use is a universal custom sustained by the courts and announced as a policy by Federal statutes (See authorities cited in footnote 1, p. 8 herein). Lastly, the provision that distributors must not sell fluid milk below the purchase price of Class I milk simply prevents loss-leaders, follows the policy of the Robinson-Patman Act and prevents distributors buying Class II and III milk and selling it as Class I.

We contend that the above, in aggregate, are all licit under the Capper-Volstead Act. This Court in *United States Alkali Association* v. *U. S.*, 325 U. S. 196, 209-10 stated:

> "This Court rejected the contention that the Capper-Volstead Act gave to the Secretary 'exclusive jurisdiction to determine in the first instance whether the acts of the cooperatives were violations of the Sherman Act because they went beyond the immunity granted by the Capper-Volstead Act.' "

There must then have been *some* immunity granted by the Act. But where is it, if the Court below is correct?

This Court has itself conceded that the Capper-Volstead Act permits co-operatives to interfere with competitive

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[3] Gaumnitz and Reed, *Some Problems Involved in Establishing Milk Prices*, Department of Agriculture 1937, p. 113; Hulbert, *Legal Phases of Co-operative Associations*, Farm Credit Administration Bulletin No. 50, pp. 221, 223; *Pick Mfg. Co.* v. *General Motors Co.*, 299 U. S. 3, 4; *U. S.* v. *Standard Oil of California*, 78 F. Supp. 850, 857, 863; *Standard Oil of California* v. *U. S.*, this Court No. 279, October Term, 1948, decided June 13, 1949. Respondent Simpson Bros., Inc., doubts the validity of full supply contracts, at least under the circumstances disclosed in *Standard Oil Company of California* v. *U. S.*, *supra*.

[4] *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441; *U. S.* v. *Colgate & Co.*, 250 U. S. 300.

processes.[5] We think the test is this side of undue enhancement of prices (Capper-Volstead Act, 7 U. S. C., Sec. 291-2). The Court below has ignored this test and denied any coverage at all to the Statute, adopting instead the shibboleth of "price-fixing". But, clearly, intra-mural price fixing is as irrelevant in a case involving an agricultural co-operative as it is in a case involving a labor union.

We conclude, therefore, by asking this Court to grant review, on the ground that the present case is, as to agricultural co-operatives, what *U. S.* v. *Hutcheson, supra* was to Labor; that this Court should synthesize the Sherman Act, the Clayton Act and the Capper-Volstead Act, as it synthesized the Labor Acts in the *Hutcheson* case. We point out that unless this Court does so a long and expensive trial is indicated, with the applicable law in great doubt.[6] This Court has frequently granted certiorari to decide a question "fundamental to the further conduct of the case". *Larson* v. *Domestic & Foreign Commerce Corporation,* No. 31, 1948 term, decided June 27, 1949; *Land* v. *Dollar,* 330 U. S. 731, 734; *U. S.* v. *General Motors Corp.,* 323 U. S. 373, 377.

We also invite attention to the fact that the judges in this jurisdiction are evenly divided as to the validity of the indictment, a circuit judge and a district judge being on each side. This was the situation leading this Court to grant review in *Paramount-Publix Corp.* v. *American Tri-Ergon Corp.,* 294 U. S. 464, and *De Forest Radio Co.* v.

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[5] *Associated Press* v. *U. S.,* 326 U. S. 1, 14, and footnote 13, 31 and footnote 1; see also *U. S.* v. *Elm Spring Farm,* 38 F. Supp. 508, 510; *Board of Trade* v. *Wallace,* 66 F. (2d) 402, 408.

[6] For instance, the opinion below (R. 28) makes *any* contract between the co-operative and the distributors, particularly if it involves the fixing of price by use (the Classified Milk Plan), illegal, unless the Secretary of Agriculture approves it. This opinion might be binding on the trial court.

General Electric Co., 283 U. S. 664, 669, neither of which appear to have been as important as the present case.

Conclusion

The Petition should be granted.

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